IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.541 OF 1987

JIMMY DOMOCIAN FERNANDES
of Bombay Indian Inhabitant
at present in THANE CENTRAL
JAIL, MAHARASHTRA ...Appellant.

V/s

THE STATE OF MAHARASHTRA
BOMBAY. ....Respondent.

Mr. K.M. Sangani for the appellant.

Mr. A.M. Shringarpure, APP for the respondent - State

CORAM: V.M. KANADE, J.
DATE : 27TH OCTOBER, 2004.

ORAL JUDGMENT:

1. Appellant has challenged the Judgment and Order passed by the Court of Sessions for Greater Bombay in Sessions Case No.567 of 1984. By the said Judgment and Order dated 9/7/1986, the Trial Court convicted the accused and sentenced him to undergo R.I. for seven years under section 397 of the Indian Penal Code and for four years under section 394 of the Indian Penal Code.

2. Prosecution's case is that the accused alongwith one other person had robbed the cash which was being carried by the complainant and his watchman and which was to be deposited in the Bank. Prosecution's case is that this money was robbed at the point of sword

and chilli powder was thrown in the eyes of the watchman who was carrying the cash. The accused were arrested after eight months. P.W.1 - Hasmukhlal and P.W. 2 - Keshavlal have stated that the appellant accused along with accused No.2 had accosted them near the Bank and had stolen money from the watchman at the point of a sword. Both of them have stated that after the chilly powder was thrown on the face of the watchman, the accused ran away with the cash which was being carried by the watchman. Though the accused Nos. 1 and 2 were arrested almost after 8 months from the date of the incident, both P.W.1 and P.W.2 identified the accused Nos. 1 and 2 in the Test Identification Parade.

3. In my view, there is no reason to disbelieve the evidence of P.W.1 and P.W.2 so far as the identification of the appellant is concerned. However, the fact remains that there is some discrepancy regarding the alleged weapon which was used in the said robbery i.e. the sword which has not been recovered at the instance of the accused. P.W.1 had not stated in his statement to the Police that the sword was shown to the watchman and to him. Thus the Prosecution's case of robbery at the point of the sword, in my view, is not proved. It is an admitted

position that neither the complainant nor the watchman were injured in the said incident. Prosecution has not proved that the accused had committed an offence under section 394 read with section 397 of the Indian Penal Code. Appellant - accused is, therefore, acquitted of the charge framed against him under section 394 read with section 397 of the Indian Penal Code.

4. However, in view of the clear testimony of P.W.1 and P.W.2, prosecution has proved that the appellant had committed an offence under section 392 of the Indian Penal Code. Appellant was arrested on 5/6/1984. He was released on bail by this Court's Order on 31/7/1987. Appellant has already undergone almost three years of sentence. Accordingly, the following order is passed:-

O R D E R

. Conviction is confirmed. However, appellant is convicted under section 392 of the Indian Penal Code and is sentenced to undergo R.I. for the period which he has already undergone during trial and during the pendency of the appeal and the appellant is acquitted of the offence punishable under section 394 read with

section 397 of the Indian Penal Code. Bail bond of the appellant to stand cancelled. Appeal is partly allowed in the above terms.

V.M. KANADE, J.